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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

CBT GROUP PLC, WILLIAM G. McCABE, JAMES J. BUCKLEY, JOHN P. HAYES, GREGORY M. PRIEST, JOHN M. GRILLOS, RICHARD Y. OKUMOTO, WILLIAM B. LEWIS, JEFFREY N. NEWTON, GREGORY G. OLSON, and WILLIAM A. BEAMISH,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN MATEO (*DURRETT*),

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a California state court apply California substantive law in a shareholder derivative action against the officers and directors of an Irish corporation, thereby ignoring the internal affairs doctrine and a treaty between the United States and Ireland?

DISCLOSURE PURSUANT TO RULE 29.6

Petitioner, CBT Group PLC, changed its name to SmartForce PLC on January 26, 2000. SmartForce is a public limited company incorporated in the Republic of Ireland. American Depository Shares of SmartForce are traded on the Nasdaq National Market System under the symbol SMTF. SmartForce has no parent companies. SmartForce has one non-wholly-owned subsidiary, CBT (Technology) Ltd.

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The opinion of the Superior Court of California for San Mateo County denying Petitioners' motion for summary judgment or, in the alternative, for summary adjudication is unreported and reprinted as Appendix A, at Page A-1. (References to the appendices bound with this Petition are Styled ("A-___").) The memorandum decision of the California Court of Appeal, First Appellate District, denying Petitioners' original petition for a writ of mandate from the trial court's order is reprinted as Appendix B, at Page A-3. The memorandum decision of the California Supreme Court denying Petitioners' petition for review is reprinted as Appendix C, at Page A-4.

JURISDICTION

The decision of the California Supreme Court was issued on November 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C § 1257(a). The action below began as an original petition for a writ of mandate in the California Court of Appeal. With the California Supreme Court's denial of the petition for review, the original proceeding for a writ of mandate below terminated, even though the underlying derivative action continues in the trial court. Accordingly, there is § 1257 jurisdiction over the judgment disposing of the writ below.[1]

[1] *E.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Fisher v. District Court*, 424 U.S. 382, 385 n. 7 (1976);

STATUTORY PROVISIONS INVOLVED

The Treaty and Protocol Between the United States of America and Ireland Regarding Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir, provides in relevant part:

Article VI(1)(a): "Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to: . . . commercial, manufacturing, processing and financial activities. . . . "

Article VI(3): "Nationals and companies of either Party shall further be accorded, within the territories of the other Party, most-favoured-nation treatment with respect to [. . . commercial, manufacturing, processing and financial activities . . .]."

Article XXI (1): "The term national treatment means treatment accorded within the territories of a Party upon terms no less favourable than the treatment accorded therein, in like situations, to nationals, companies . . . of such Party."

Article XXI (2): "The term most-favoured-nation treatment means treatment accorded within the territories

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Madruga v. Superior Court, 346 U.S. 556, 557 n. 1 (1954); *Rescue Army v. Municipal Court*, 331 U.S. 549, 565-68 (1947); *Bandini Petroleum Corp. v. Superior Court*, 284 U.S. 8, 14-15 (1931); *see Board of Educ. v. Superior Court*, 448 U.S. 1343, 1345-46 (1980) (Rehnquist, J., in chambers) ("the Board's petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the California Supreme Court's judgment").

of a Party upon terms no less favourable than the treatment accorded therein, in like situations, to nationals, companies . . . of any third country."

Article XXI (3): "As used in the present Treaty, the term companies means corporations. . . . Companies created or organized under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."

Article XXI (4): "National treatment accorded under the provisions of the present Treaty to companies of Ireland shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories and possessions of the United States of America."

STATEMENT OF THE CASE

I. BACKGROUND FACTS

Petitioner CBT Group PLC ("CBT") is a public limited company incorporated under the laws of the Republic of Ireland.[2] CBT develops and markets a library of interactive software used to train people to use software programs. Because CBT is an Irish corporation, its stock is

[2] Effective January 26, 2000, CBT changed its name to SmartForce PLC. For simplicity, this Petition refers to the company as CBT.

not traded in the United States; rather, American Depository Shares ("ADSs") are traded on the NASDAQ National Market System. An ADS represents an ownership interest in the securities of foreign corporations such as CBT that have been deposited in the United States.

Petitioner William G. McCabe is Chairman of the Board of Directors of CBT. Petitioners John P. Hayes, Gregory M. Priest, and John M. Grillos, are officers and directors of CBT. Messrs. McCabe and Hayes are residents of Ireland.

Petitioners James J. Buckley and Richard Y. Okumoto are former officers and directors of CBT. Petitioners William B. Lewis, Jeffrey N. Newton, and William A. Beamish are current officers of CBT; Mr. Beamish is an Irish resident. Petitioner Gregory G. Olson is a former officer of CBT.

The plaintiff in the underlying action, Richard Durrett, purports to own CBT American Depository Shares. On October 24, 1998, Mr. Durrett filed a purported derivative action alleging that CBT's officers and directors breached purported fiduciary duties to the Company arising under California law. Mr. Durrett purports to bring the action for CBT's benefit.

II. PROCEEDINGS BELOW IN THE CALIFORNIA COURTS.

On June 21, 1999, Petitioners filed a Motion for Summary Judgment or, in the Alternative, for Summary Adjudication, in the Superior Court of California for the County of San Mateo. Petitioners argued that, under the

internal affairs doctrine, Irish law governs the substantive elements of plaintiff's claims for breach of fiduciary duty against the officers and directors of an Irish corporation. Because the Complaint did not even attempt to state a claim under Irish law, Petitioners argued that it was fatally defective.

On August 24, 1999, the Respondent Court heard argument on Petitioners' motions. Later that day, the Respondent Court issued a summary form of order denying defendants' motions.

Petitioners subsequently filed an original petition for writ of mandate with the California Court of Appeal against the Respondent Court. The Appellate Court denied the petition without opinion on October 27, 1999. (A-3). Petitioners filed a Petition for Review with the California Supreme Court on November 5, 1999. The Petition for Review was denied without opinion on November 23, 1999. (A-4).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decisions below not only constitute an unprecedented affront to established principles of corporate governance, but also contravene an international treaty and principles of international comity.

Overwhelming precedent holds that the duties of officers and directors to their corporation, and a shareholder's standing to bring a derivative suit in the corporation's name, are governed by the law of the place of

incorporation. This Court recently has reiterated this bedrock principle of corporate law – the "internal affairs" doctrine – on no less than four occasions. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 102 (1991); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 90 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 621 (1983).

Plaintiff's derivative complaint alleges that the individual Petitioners, officers or directors of CBT, breached fiduciary duties they owed to CBT. These duties are defined and governed by the law of Ireland, the country where CBT is incorporated. As the Ninth Circuit recently made clear in a case indistinguishable from this case, "[u]nder the 'internal affairs' doctrine, the rights of shareholders in a foreign company, including the right to sue derivatively are determined *by the law of the place where the company is incorporated.*" *Batchelder v. Kawamoto*, 147 F.3d 915, 920 (9th Cir.) (citing cases) (emphasis added), *cert. denied*, 119 S. Ct. 446 (1998).

The Respondent Court ignored this established principle of corporate governance in holding that the internal affairs of a corporation organized under Irish law may be governed by California state law. This holding is indefensible.

Not only did the Respondent fail to follow this Court's numerous holdings, it ignored the provisions of a treaty between the United States and Ireland. *See* Treaty and Protocol Between the United States of America and Ireland Regarding Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., arts. VI(1)(a), XXI(1), 1 U.S.T.

785. The Treaty requires all American jurisdictions to accord Irish nationals and Irish companies the same treatment that they accord persons and companies from other American jurisdictions. Because American jurisdictions, including California, are supposed to apply the law of the place of incorporation to disputes involving the internal affairs of corporations, the Treaty required the Respondent Court to apply Irish law to the claims in this case. The Respondent Court's failure to do so contravenes the Supremacy Clause of the Constitution and conflicts with principles of international comity.

Indeed, the Respondent Court even ignored a Brief Amicus Curiae from the Government of the Republic of Ireland. In arguing that Irish law must be applied to this case involving CBT's internal affairs, the Irish Government stressed the importance of the internal affairs doctrine and the Treaty to its sovereignty as well as the settled expectations of Irish corporations. (The Irish Government's Brief before the Respondent Court is reprinted as Appendix D, at Page A-5)

Accordingly, the Court should grant certiorari.

I. CERTIORARI SHOULD BE GRANTED TO REAFFIRM THE UNDENIABLE IMPORTANCE OF THE INTERNAL AFFAIRS DOCTRINE TO ACTIONS INVOLVING FOREIGN CORPORATIONS

In *CTS Corp.*, this Court held that "[the] free market system depends at its core upon the fact that a corporation – except in the rarest situations – is organized under,

and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation." 481 U.S. at 90. The purpose of this doctrine is to prevent a corporation and its officers and directors from facing differing or conflicting legal standards. Thus, "[t]he internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders – because otherwise a corporation could be faced with conflicting demands." *Edgar*, 457 U.S. at 645.[3] The principle underlying these decisions is that the substantive, governing powers of a corporation, such as the right to file a derivative lawsuit in the corporation's name, are created and must be regulated by the law of the place of incorporation.

As capital markets become more international, corporations from many countries operate and raise money in the United States. Indeed, in its most recent Annual Report, the Securities and Exchange Commission noted that there are now more than 1,100 foreign corporations from 56 countries which have issued public securities in the United States. *Securities and Exchange Commission 1998 Annual Report to Congress* (available at <http://www.sec.gov/asec/annrep98/ar98main.htm#mr>). These

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[3] *Accord Kamen*, 500 U.S. at 102 (whether plaintiff required to make demand on board of directors before filing derivative lawsuit must be determined under law of state of incorporation); *First Nat'l City Bank*, 462 U.S. at 621 ("the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation.").

corporations, and the commercial relations between the United States and their countries of incorporation, depend on the certainty that the internal affairs of corporations are governed under one law, that of the country of incorporation.

Indeed, the Respondent Court below ignored a Brief Amicus Curiae filed by the Government of the Republic of Ireland which argued this very point. The Irish Government made clear that the internal affairs doctrine provides essential predictability for foreign companies in the United States. A corporation that is unable to identify the legal obligations it has with its officers, directors, or shareholders will be unable to ensure its compliance with those obligations. (A-11) Such uncertainty would undermine the goal of expanding international capital markets and ultimately deter foreign companies from having American shareholders.[4] The Irish Government's Amicus

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[4] *See* Letter of Transmittal for Securities and Exchange Commission 1998 Annual Report to Congress from Chairman Arthur Levitt to Vice President Albert Gore, Jr. and Speaker of the House of Representatives J. Dennis Hastert ("We continued our efforts to widen the range of choices available to U.S. investors by promoting the internationalization of our markets. In 1990, 434 foreign companies were reporting in the U.S.; today, there are over 1,100 foreign companies from 56 countries. We will continue to do all we can to encourage more companies to list here to afford U.S. investors the protections of U.S. securities laws.") (available at http://www.sec.gov/asec/annrep98/ar98ltr.htm).

Accord International Disclosure Standards, SEC Release Nos. 33-7637, 34-41014; International Series Release No. 1182, 1999 SEC LEXIS 228, at *4 (Feb. 2, 1999) ("We have long believed that investors in the United States benefit when they have a wide range of investment choices, and we have sought to

Brief demonstrates that the issues raised by this petition are of significant national and international concern and should be considered by this Court.

The Ninth Circuit recently reaffirmed the importance of the internal affairs doctrine for foreign corporations in *Batchelder v. Kawamoto*, 147 F.3d 915, a case on all fours with this case. In *Batchelder*, plaintiff was an American who held American Depository Receipts of Honda, a Japanese corporation. Plaintiff filed a derivative action in California federal court purporting to sue Honda's officers and directors on behalf of the corporation. The Ninth Circuit affirmed dismissal, holding that Japanese law applied to plaintiff's derivative claims. The court held: "Under the 'internal affairs' doctrine the rights of shareholders in a foreign company, including the right to sue derivatively, are determined by the law of the place where the company is incorporated." *Id.* at 920 (citing cases). Thus, the Ninth Circuit concluded that plaintiff's right to maintain a derivative action and the elements of any claim must be decided under Japanese law, not California law. The same result is compelled here. *See Hausman v. Buckley*, 299 F.2d 696 (2d Cir. 1962) (applying Venezuelan law to plaintiff's qualifications to bring derivative suit on behalf of Venezuelan company).[5]

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increase their investment opportunities in foreign companies while preserving the protections they have come to expect under the federal securities laws.").

[5] *Accord* Restatement (Third) of Foreign Relations Law of the United States § 213 (1986), reporters' note 5 ("The conflict of laws rule looks to the state of incorporation for the rules governing the 'internal affairs' of a corporation, such as voting rights and rights of shareholders to bring derivative suits. While

The Respondent Court's decision clearly conflicts with the Ninth Circuit's decision in *Batchelder*. Where state court decisions conflict with a decision of a U.S. Court of Appeals, certiorari is appropriate. 28 U.S.C. § 1257(a); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 669, 674 (1979) (granting certiorari where U.S. Court of Appeals for Ninth Circuit and Supreme Court of Washington issued conflicting decisions on meaning of treaty).

Petitioner CBT is incorporated in the Republic of Ireland. Accordingly, plaintiff's ability to bring a derivative action in CBT's name, and the elements of any claim that plaintiff may assert against CBT's officers and directors, unquestionably implicate CBT's internal affairs, which are governed by the laws of Ireland. *Kamen*, 500 U.S. at 102. The Respondent Court's holding that California law governs the internal affairs of CBT directly conflicts with this Court's established precedent and the Ninth Circuit's decision in *Batchelder*, and ignores the clear position of the Government of Ireland that Irish corporations must be governed by Irish law.[6]

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this rule has been developed for conflicts between the laws of the States of the United States, it has been applied as well where laws of a foreign state were involved.").

[6] Under Irish law, a shareholder may pursue a claim derivatively on behalf of the corporation only in a few limited circumstances not applicable here, such as *ultra vires* or illegal acts, disregard of voting rules, or where majority shareholders defraud minority shareholders. *See, e.g., O'Neill v. Ryan*, [1993] IRLM 557; *Foss v. Harbottle* (1843) 2 Hare 461. Plaintiff's Complaint did not even attempt to allege any of the circumstances under which Irish law permits a derivative action.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE RESPONDENT COURT'S DECISION IGNORES AND CONFLICTS WITH A TREATY BETWEEN THE UNITED STATES AND IRELAND

In addition to applicable case and statutory authority, a treaty between the United States and Ireland required the Respondent Court to apply Irish law. In 1950, the United States and Ireland signed a treaty providing that an Irish company must be accorded "no less favourable" treatment in American jurisdictions with respect to its various activities than accorded companies incorporated in other states in the United States. *See* Treaty and Protocol Between the United States of America and Ireland Regarding Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., art. VI(1)(a) and art. XXI(1), 1 U.S.T. 785. Thus, the Treaty requires that an Irish company be accorded no less favorable treatment in California than California accords companies incorporated in any other state or country. *Id.* art. XXI(2-4).[7] The Treaty is still in effect.

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[7] Article VI(1)(a) of the Treaty provides that "companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to . . . commercial, manufacturing, processing and financial activities. . . . " Article XXI, section 3 defines "companies" to include "corporations." Article XXI, section 4 provides, in turn, that "[n]ational treatment accorded under the provisions of the present Treaty to companies of Ireland shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories and possessions of the United States of America." Article VI(3) of the Treaty provides, further, that "companies of either Party shall further be accorded, within the territories of the other Party, most-favoured-nation treatment with respect to

Such treaties have been a central feature of U.S. international economic policy from the beginnings of the Republic. The first such treaty was signed with France in 1778, eleven years before adoption of the Constitution, and was the first treaty of any kind concluded by the United States. Herman Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805 (1958). As this Court has held, one purpose of friendship, commerce and navigation treaties is "to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 186 (1982).

American jurisdictions apply the law of the place of incorporation to disputes involving the internal affairs of corporations incorporated in other states of the United States or other countries. *E.g., McDermott, Inc. v. Lewis*, 531 A.2d 206, 216 (Del. 1987) ("The umbilical tie of the foreign corporation to the state of its charter is usually still religiously regarded as conclusive in determining the law to be applied in intracorporation disputes.") (citation omitted). California law is in accord. *E.g.*, Cal. Corp. Code § 2116 ("The directors of a foreign corporation transacting intrastate business are liable to the corporation . . . according to any applicable *laws of the state or*

[its various] activities. . . . " Article XXI, section 2 provides, likewise in turn, that "most-favoured-nation treatment means treatment accorded within the territories of a Party upon terms no less favourable than the treatment accorded therein, in like situations, to . . . companies . . . of any third country."

place of incorporation or organization, whether committed or done in this state or elsewhere.") (emphasis added).[8] Accordingly, as the Irish Government argued in its Amicus Brief, the Respondent Court was obligated to accord similar treatment to Petitioners by applying Irish law to this case.[9] (A-10-A-11) The Respondent Court's failure to apply Irish law here directly and impermissibly contravenes the Treaty, and therefore violates Article VI, Section 2 of the United States Constitution.

The question of which law governs foreign corporations operating in the United States is one of great gravity and importance. Rights claimed by foreign corporations pursuant to treaties are matters of international concern. Because of the importance of honoring international

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[8] *Accord American Center for Educ., Inc. v. Cavnar*, 80 Cal. App. 3d 476, 485, 145 Cal. Rptr. 736, (1978) (holding that "the laws of the place of incorporation" apply to "matters involving the internal affairs of a corporation"); *Professional Hockey Corp. v. World Hockey Ass'n*, 143 Cal. App. 3d 410, 414, 191 Cal. Rptr. 773 (1983) (applying Delaware corporate law to duties of directors of a Delaware corporation); *McDermott v. Bear Film Co.*, 219 Cal. App. 2d 607, 608, 33 Cal. Rptr. 486 (1963) (shareholder derivative action, "[s]ince Color-Pix is an Oregon corporation, the laws of that state govern its internal procedures"); *Pratt v. Robert S. Odell & Co.*, 49 Cal. App. 2d 550, 559-60, 122 P.2d 684 (1942) (liability of director of foreign corporation must be enforced according to laws of state of incorporation).

[9] Courts have long given deference to the view of treaty signatories. *See, e.g., Sumitomo*, 457 U.S. at 183-84 & n. 9 (discussing views expressed by Ministry of Foreign Affairs of Japan and Embassy of Japan in the United States); *Xerox Corp. v. United States*, 41 F.3d 647, 656 (Fed. Cir. 1994) (discussing the views of the United Kingdom).

treaty obligations, this Court has frequently granted certiorari to consider foreign litigants' treaty rights. *See, e.g., Sumitomo,* 457 U.S. at 177-78 (granting certiorari to decide whether the Friendship, Commerce and Navigation Treaty between the United States and Japan provides a defense to a federal employment discrimination suit); *accord Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. at 669, 674 ("We granted certiorari in the state and federal cases to interpret this important treaty provision and thereby to resolve the conflict between the state and federal courts regarding [the meaning of the treaty]"); *Kolovrat v. Oregon,* 366 U.S. 187, 191 (1961) ("We granted certiorari because the cases involve important rights asserted in reliance upon federal treaty obligations.")

Irish corporations have the settled expectation that the courts of California and every other American jurisdiction will apply Irish law in cases concerning their internal affairs. Only by reiterating that the internal affairs doctrine will be applied in all American jurisdictions can the Court serve the settled expectations of foreign corporations and the need for uniformity and predictability in the conduct of international corporate affairs. The Respondent Court's refusal to honor the internal affairs doctrine fosters the kind of uncertainty for Irish corporations doing business in the United States that the Treaty is intended to prevent. This Court should not sanction such a result.

Finally, the three individual Petitioners who are Irish citizens must be accorded no less favorable treatment in this case than U.S. jurisdictions accord citizens of any other country. Treaty arts. VI(1)(a), XXI(2). Because

United States law makes them liable to their companies only according to the laws of the place of incorporation, the Treaty mandates that these individual defendants may be held liable to CBT *only* according to the laws of Ireland, if at all.

III. CERTIORARI SHOULD BE GRANTED BECAUSE PRINCIPLES OF INTERNATIONAL COMITY REQUIRE APPLICATION OF THE INTERNAL AFFAIRS DOCTRINE TO FOREIGN CORPORATIONS

International comity "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation. . . . " *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). *Accord Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987) (American courts should "take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state."). Thus, the principle of international comity encompasses not only deference to foreign judicial proceedings, but also respect for the capacity of foreign legal systems to create bodies of law which govern the conduct of their citizens. *Hilton*, 159 U.S. at 164; *Mars Inc. v. Nippon Conclux Kabushiki-Kaisha*, 825 F. Supp 73 (D. Del. 1993) (declining to exercise jurisdiction over action alleging infringement of Japanese patent on ground of international comity even where no foreign judicial proceedings pending), *aff'd*, 24 F.3d 1368 (Fed. Cir. 1994). American

courts have long attempted "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), for example, the Court gave great weight to the concerns of foreign nations that their rights would be infringed by an overbroad application of a U.S. statute. At issue was whether the National Labor Relations Act should apply to the crews of foreign-flag ships. The court highlighted the possibility of international discord in such circumstances and restated the "well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." *Id.* at 21.

The rule in *McCulloch* is analogous to the internal affairs doctrine at issue here. The same concern for the international legal order demonstrated in *McCulloch* mandates that Irish law apply to the internal affairs of CBT, an Irish corporation.

Indeed, the Irish Government's Amicus Brief to the Respondent Court made clear its abiding interest in ensuring that the internal affairs of Irish corporations are governed by Irish law. As the Irish Government stated: "Ireland has a sovereign interest in governing the conduct of its own citizens," and in the development of a predictable and consistent international legal framework wherein corporations and managers can identify and comply with their legal obligations. (A-7-A-8, A-11)

By failing to apply the internal affairs doctrine, the Respondent failed to respect Ireland's stated sovereign interests. The *ad hoc* application of non-Irish law raises

the specter of unforeseen liability for Irish companies and their officers and directors. Such a result would not only deter other Irish corporations from doing business in the United States, but also risks disruption of proper relations between the United States and another country.

CONCLUSION

For all of these reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

JUDGE DEPT. NO. 14	CASE NO. 406767
DEPUTY CLERK	COURT REPORTER
Donna Carter	Loretta Duran
Honorable Rosemary Pfeiffer	DATE 24 AUG 1999

TITLE OF ACTION: RICHARD T. DURRETT ETAL VS WILLIAM G MCCABE, ETAL

NATURE OF EVENTS: DEFTS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION (7-20)

Mark Molumphy and Gwendolyn Giblin for Pltf.
APPEARANCES

Ignacio Salcedo and Theodore Allegaert for Defendant
APPEARANCES

__ OFF CALENDAR
__ MOVING PARTY'S REQUEST
__ NONAPPEARANCE
__ STIPULATION
__ THE ABOVE MATTER IS CONTINUED/ASSIGNED TO _____
__ SUBMITTED ON POINTS AND AUTHORITIES WITHOUT ARGUMENT.
X MATTER ARGUED BY COUNSEL AND SUBMITTED.
__ MOTION GRANTED
__ MOTION DENIED
__ DEMURRER
__ SUSTAINED _____ DAYS TO AMEND.

__ OVERRULED _____ DAYS TO ANSWER.
__ GROUNDS _____

X THE ABOVE MATTER IS TAKEN UNDER SUBMISSION.
__ POINTS AND AUTHORITIES TO BE SUBMITTED BY _____ NOT LATER THAN _____ AND BY _____ NOT LATER THAN _____
__ NOTICE OF RULING IS _____ WAIVED IN OPEN COURT.

X Later:_____

The matter having been argued and submitted, the motion for summary judgment is denied – disputed material facts 3 and 4.
rp 8/24/99

__ LET A WRITTEN ORDER BE PREPARED, SIGNED AND FILED.
DATE: August 24, 1999
NATURE OF PROCEEDINGS: Defts.' Motion For Summary Judgment

LAW AND MOTION MINUTE FORM
CC: Mark Molumphy & Gwendolyn Giblin
Ignacio Salcedo & Theodore Allegaert

APPENDIX B

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 1

CBT GROUP PLC, ET AL.,
Petitioners,
v.
THE SUPERIOR COURT
OF SAN MATEO
COUNTY,
Respondent;
RICHARD T. DURRETT,
Real Party in Interest.

A088444
San Mateo County No.
406767

(Filed Oct. 27, 1999)

BY THE COURT:

The petition for writ of mandate and the request for stay are denied. The justices participating in this matter were:

X Strankman, P.J. __ Stein, J. X Swager, J. X Marchiano, J.

Date: OCT 27 1999 STRANKMAN, P.J. P.J.

APPENDIX C

First Appellate District, Division One No. A088444
S083415

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

CBT GROUP, PLC et al., Petitioners

v.

SAN MATEO COUNTY SUPERIOR COURT, Respondent

(Filed Nov. 23, 1999)

Application for stay and petition for review DENIED.

GEORGE
Chief Justice

APPENDIX D

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Attorneys for AMICUS CURIAE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

RICHARD T. DURRETT, Derivatively on behalf of CBT GROUP PLC, Plaintiff, v. WILLIAM G. McCABE, JAMES J. BUCKLEY, JOHN P. HAYES a.k.a. JACK P. HAYES, GREGORY M. PRIEST, JOHN M. GRILLOS, RICHARD Y. OKUMOTO, WILLIAM B. LEWIS, JEFFREY N. NEWTON, GREGORY G. OLSON, WILLIAM A. BEAMISH, and DOES 1 through 100 inclusive, Defendants, -and- CBT GROUP PLC, Nominal Defendant.	**Case No. 406767** **BRIEF OF IRELAND AS AMICUS CURIAE** Date: July 20, 1999 Time: 9:00 a.m. Dept: 13

BRIEF OF IRELAND AS AMICUS CURIAE[1]

INTEREST OF IRELAND

The nominal defendant in this action, CBT Group PLC ("CBT"), is a corporation organized under the laws of Ireland. Plaintiff Richard T. Durrett, a holder of "American Depository Shares" ("ADSs")[2] in CBT, has asserted derivative causes of action under California law, on CBT's behalf, against CBT's directors and officers. Plaintiff alleges that the defendants have breached fiduciary duties owed to CBT and that CBT has thereby sustained damages. Ireland regards allegations of misconduct within an Irish corporation to be serious matters. Accordingly, Ireland has developed an elaborate body of corporate law which defines the duties owed to a corporation by its officers and directors and provides mechanisms to remedy any breach of those duties. While Ireland takes no position as to the appropriate outcome of this case, it believes that both law and policy require Irish law be applied to determine that outcome.

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[1] Ireland is submitting this brief solely as ar amicus curiae. Ireland is not appearing for any purpose, nor waiving any objection to jurisdiction by this Court over Ireland.

[2] The holder of an ADS is not an owner of stock in the corporation. This distinction may have certain ramifications as to the holder's standing to bring a shareholder derivative suit. Ireland raises this point only to highlight the need to apply Irish law to resolve this dispute. As the law of the place of incorporation, Irish law is the only law relevant to determine ownership status in the corporation.

Ireland has a sovereign interest in governing the conduct of its own citizens.[3] It is the established policy of Ireland that Irish law governs the internal affairs of corporations registered in Ireland. The application of California law to resolve questions of CBT's internal affairs would violate this established policy and would infringe the sovereignty of Ireland.

Ireland believes that this case will have broad ramifications. The choice of law inquiry conducted in this case could influence other courts in their adjudication of disputes between U.S. citizens and foreign corporations. As a sovereign nation, Ireland can offer the court unique insight into the fundamental policies and interests at stake; namely, the promotion of international justice and the preservation of the international legal order.

The economic ties between Ireland and the United States have always been strong, and the trend towards globalization in recent years has helped the Irish economy to flourish.[4] Like the United States, Ireland is heir to the English common law system, and has developed a

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[3] "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized." *Restatement (Third) of the Foreign Relations Law of the United States* § 213 (1987). (Hereinafter *Foreign Relations Restatement*).

[4] The Irish economy is the fastest growing economy in the European Union and Organization for Economic Cooperation and Development, with real economic growth of 5-10 percent per annum since 1995. See *Country Commercial Guide: Ireland, Fiscal Year 1998*. Full text available at http://www.flatrade.org/CCG/IRELAND.HTM.

comprehensive body of corporate law from those historical roots. Ireland has a significant interest in ensuring the continued growth of international trade and investment and has applied its laws with a view to providing the transparency and predictability necessary to facilitate commercial relations. This case has the potential to disrupt the prosperous economic ties that now exist between the U.S. and Ireland. The application of California law to this dispute would expose Irish corporations operating in the U.S. to unforeseen liability. The prospect of increased liability will deter other Irish corporations from entering the U.S. market, and the result will be a chilling effect on international economic ties. In the interests of promoting economic growth and prosperity between our two nations and establishing a stable legal framework for international trade, Ireland respectfully submits that this Court should confirm the applicability of the internal affairs doctrine and apply Irish law to the resolution of this dispute.

ARGUMENT

I. INTERNATIONAL LAW AND POLICY MANDATE THE APPLICATION OF IRISH LAW TO RESOLVE THIS DISPUTE.

A. The Application of California Law to this Shareholder Derivative Suit Violates the U.S.-Ireland Treaty of Friendship, Commerce and Navigation.

The international standard for adherence to treaty obligations is *pacta sunt survanda:* every treaty is binding on the parties to it and must be performed by them in

good faith.[5] In 1950, the United States and Ireland entered into a Treaty of Friendship, Commerce and Navigation.[6] Article VI of the Friendship, Commerce and Navigation Treaty requires that companies of either party be accorded national treatment. Article XXI specifies that "national treatment accorded under the provisions of the present Treaty to companies of Ireland shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories and possessions of the United States of America."

The internal affairs doctrine is well-established in U.S. law. It provides that a corporation's internal affairs are governed by the law of its state of domicile. *CTS Corp v. Dynamics Corp. of Am.*, 481 U.S. 69, 90 (1987). "The conflict of laws rule looks to the state of incorporation for the rules governing the 'internal affairs' of a corporation, such as voting rights and rights of shareholders to bring derivative suits. While this rule has been developed for conflicts between the laws of the States of the United States, it has been applied as well where laws of a foreign

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[5] *Foreign Relations Restatement* § 321. The language of this section follows Article 26 of the Vienna Convention of the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. While the United States has not yet formally acceded to the Convention, it has been treated as authoritative by the executive and the judiciary. See Oliver, Firmage, et al., *The International Legal System* 992 (1995, 4th ed.). Comment (a) of the *Foreign Relations Restatement* calls *pacta sunt servanda* "perhaps the most important principle of international law."

[6] Treaty Regarding Friendship, Commerce and Navigation, Jan. 21, 1960, U.S.-Ir., 1 U.S.T. 785 [hereinafter Friendship, Commerce and Navigation Treaty].

state were involved." *Foreign Relations Restatement* § 213, reporters' note 5. *See Hausman v. Buckley*, 299 F.2d 696 (2d Cir. 1962), certiorari denied, 369 U.S. 885 (1962) (applying Venezuelan law as to qualifications to bring shareholders suit).

The internal affairs doctrine is firmly established in California law. California courts have consistently upheld the principle that "the laws of the place of incorporation" apply to "matters involving the internal affairs of a corporation." *American Center for Education, Inc. v. Cavnar*, 80 Cal. App. 3d 476, 485 (1978). A shareholder derivative suit is a classic example of an internal matter subject to the internal affairs doctrine. *See McDermott v. Bear Film Co.*, 219 Cal. App. 2d 607, 608 (1963) (Oregon law governs the internal procedures of Oregon corporations). California courts have applied the internal affairs doctrine with equal force in cases involving corporations incorporated under the laws of foreign countries. *See Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 471 (1992). ("Hong Kong's overriding interest in the internal affairs of corporations domiciled there would in most cases require application of its law.") *See also Batchelder v. Kawamoto*, 147 F.3d 915 (9th Cir. 1998) (Regarding the right of an ADR holder to bring a derivative suit, the court noted "the rights of shareholders in a foreign company, including the right to sue derivatively, are determined by the law of the place where the company is incorporated").

Under the Friendship, Commerce and Navigation Treaty, the internal affairs doctrine would apply equally to corporations incorporated in a sister state and to those incorporated in Ireland. The terms of the Friendship, Commerce and Navigation Treaty must in good faith be

performed by both Ireland and the United States. Article VI mandates the application of the internal affairs doctrine to this litigation. Consequently, Irish law must be applied to resolve disputes between the corporation and its directors.

B. Application of Irish Law Promotes Predictability in the International Legal Regime.

The globalization trend of recent years has created immense opportunity in the international market and corporations now routinely transact business across international borders. Yet with increased international opportunities come increased risks. A corporation that is unable to identify its precise legal obligations will be unable to ensure its compliance with those obligations. This element of legal unpredictability creates a barrier to the growth of the international market. In order to overcome this obstacle, every nation must share the responsibility of promoting the development of a transparent legal framework to govern and sustain international commerce. This responsibility necessarily involves the exercise of self restraint when the application of national laws may introduce elements of unpredictability into the international legal regime.

C. Principles of Comity and Reciprocity Point to the Application of Irish Law.

It is a central principle of international law that each nation must constrain the application of its own internal laws in order to avoid direct conflict with the laws of

other nations. Respect for the "comity of nations" is a key mechanism for resolving issues of jurisdiction and choice of law between nations. A comity analysis should assess the potential degree of conflict with foreign law or policy. *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 749 F.2d 1378, 1383-86 (9th Cir. 1984). The closely related principle of reciprocity – whether the other state would exercise jurisdiction if the circumstances were reversed is another important factor to consider. *Foreign Relations Restatement*, § 403 reporters' note 5.

Ireland has a firmly established internal affairs doctrine. As stated in a leading treatise on Irish law, "a company's internal affairs (*i.e.*, relations between the company and its members and directors) are governed in the main by the law of the State in which it is registered."[7] Under Irish law, if an entity incorporated in California were to be named as a defendant in a shareholder derivative suit before an Irish court, the Irish court would either decline to assert jurisdiction or apply California law to resolve the dispute.[8] In the interest of reciprocity, Ireland asks this court to exercise a corresponding degree of restraint and apply Irish law to this dispute.

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[7] Forde, *Company Law* 483 (2nd ed. 1992).

[8] *See e.g.*, Dicey and Morris, *The Conflict of Laws* 1112-1113 (12th ed, 1993) ("English courts are reluctant to intervene in domestic issues between members of a foreign corporation"). Irish courts accept Dicey and Morris as the leading and authoritative source concerning conflicts of law issues.

D. Application of California Law to this Dispute Violates Ireland's Sovereign Rights.

There are certain internationally recognized rights associated with nationhood. In the political realm, prominent examples are sovereign equality of states, territorial integrity, and political independence.[9] Nations also have certain exclusive jurisdictional rights: the jurisdiction to prescribe rules of law; the jurisdiction to adjudicate legal questions; and the jurisdiction to enforce the law. When judicial proceedings involve parties from different nations, the courts must ensure that the exclusive jurisdictional rights of either nation are not infringed. The courts of the United States, for example, conduct jurisdictional inquiries "against the backdrop of the presumption against extraterritoriality." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). Courts have refused to interpret statutes as having extraterritorial effect when it is necessary "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 248. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963) (holding a U.S. statute inapplicable to a Honduran vessel).

In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), the Supreme Court gave great weight to the concerns of foreign nations[10] that their rights would be infringed by an overbroad application of

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[9] Article 2 of the Charter of the United Nations, Jun. 26, 1945.

[10] The governments of the United Kingdom, Canada and the Republic of Honduras filed *amici curiae* briefs in *McCulloch*.

a U.S. statute. At issue was whether the National Labor Relations Act should apply to the crews of foreign-flag ships. The court highlighted the possibility of international discord in such circumstances and restated the "well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." *Id.* at 21. This rule is analytically analogous to the internal affairs doctrine at issue in the present case. The same concern for the international legal order demonstrated in *McCulloch* should cause this court to apply Irish law to the internal affairs of this Irish corporation.

E. Application of California Law Undermines the Coherence of Ireland's Corporate Law.

Each nation has the exclusive right to promulgate laws to regulate the conduct of its citizens. Ireland has done so with respect to its corporate citizens. The corporations law of Ireland is a highly developed, comprehensive, and coherent body of law. The corporations law is grounded in the common law tradition of Great Britain and the Commonwealth nations, and through long experience the Irish courts have developed core principles which maintain coherence and uniformity in the application of this body of laws.

As part of the process of formal incorporation, a business entity evaluates the legal rights and obligations it will have under a particular body of law. The corporations on the register of Ireland have the right to expect certain protections and guarantees afforded by the corporations law, and they can look to extensive precedent to

understand their duties and obligations. In order to maintain the carefully wrought balance of these corporate rights and obligations, it is essential that Irish law continue to be applied to resolve internal disputes in Irish corporations. The application of California law to an internal corporate affair would destroy the coherence of the Irish corporations law and expose an Irish corporation to liability under a regulatory patchwork lacking uniformity of principle. The legal uncertainty involved in piecemeal application of U.S. and Irish law would ultimately deter Irish companies from participation in the U.S. market and would have a detrimental impact on the trade relations of both nations.

CONCLUSION

For all the foregoing reasons, Ireland respectfully requests the application of Irish law to resolve the dispute before this court.

Dated: July 2, 1999

FULBRIGHT & JAWORSKI, L.L.P.
DOUGLAS W. STERN

By: /s/ Douglas W. Stern
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Attorneys for
Amicus Curiae